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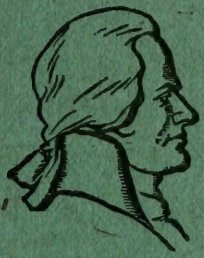
TRADE-MARKS

By CLOWRY CHAPMAN



MODERN BUSINESS
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ALEXANDER HAMILTON INSTITUTE
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Trade-Marks

By

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Trade-Mark Specialist; Author, "The Law of Advertising and Sales"

One of a Series of Modern Business Lectures
Especially Prepared for the
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CLOWRY CHAPMAN

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Clowry Chapman is a member of the New York Bar. Upon his graduation from the University of Michigan in 1894 with a degree of Bachelor of Laws, his contributions to the American and English Encyclopedia of Law and various legal periodicals attracted attention.

In October, 1901, while a partner of the general counsel of the Central Union Telephone Company, Mr. Chapman established the first collegiate chair on telegraph and telephone law in the Northwestern University Law School.

Mr. Chapman discontinued his general corporation practice in 1902 and took up advertising, first as a study and then as a business, drawing largely upon his previously acquired knowledge of the different sections of the country and upon his power of convincing readers thru the printed appeal, learned as brief writer.

Mr. Chapman is the author of "The Law of Advertising and Sales," in the preparation of which, he devoted six years to the collection, testing and arrangement of data.

Among Mr. Chapman's creations are the Regal Shoe "Buzz Saw Window of the Sole" and the Rock Island Railroad System globe trade-mark, known by the designation of "The Rock Island States of America." He is codesigner of the national "Made in U. S. A." symbol which was awarded first prize of Detroit Board of Commerce and El Paso Chamber of Commerce in competition with 119,000. He was one of the pioneers in the advertising of advertising and in fighting fraudulent advertising.

Mr. Chapman has become well known as an adviser on the law relating to advertising and sales, and as a designer and protecter of trademarks and labels.

adoption and use, of which registration is merely evidence.

Nevertheless, registration does give certain advantages:

First. It is a claim of title that will stand, unless a competitor proves by overwhelming evidence his prior adoption and use of a given trade-mark. On the other hand, if you do not register your trade-mark, and subsequently go into court to stop infringement, you will have to prove your prior adoption and use; also that the use of the mark by your competitor is an infringement and, as such, threatens to, or is, diverting good-will that would otherwise result in purchases from you.

Second. Registration gives you the privilege of calling upon the help of the United States courts, where judges are usually more expert in trade-mark matters than the judges of state courts. If you fail to register your trade-mark you can not call upon the help of the United States courts unless the amount in controversy is at least $1,000, and unless you and your competitor live in different states.

Third. If a trade-mark is registered, damages for infringement may be fixed at three times the amount allowed by the verdict of a jury; this in addition to the enjoining of the infringement and the destruction of the offensive labels, packages, and so on.

Fourth. Registration acts as a sort of "keep off the grass" sign, for it is a claim to exclusive enjoyment of a given mark, filed in an office where your competitors are expected to look for information when contemplating the adoption of a trade-mark. Unintentional infringement is frequently prevented in this way. Inasmuch as every infringement, no matter how trifling, would in some measure interfere with your profits and good-will, and since efforts to stop an infringement would cause annoyance and draw upon your time, your efforts, and your means, it is economical to make this public record of your claim.

Fifth. Registration in the Patent Office is a prerequisite to registration in many foreign countries.

Registration Abroad

Registration of trade-marks in Latin America and in several other countries secures what is really in the nature of a government franchise to do business. So valuable is this franchise that if the American owner of the trade-mark does not register in time some one in each of several foreign countries will almost certainly do so. It is immaterial how long the original owner has used the trade-mark elsewhere. By his delay in registering he forfeits his prospective territorial rights to it, and other registrants succeed to those rights and absolutely control the particular foreign market in which each has registered.

Such a registrant may there seize all goods bearing the trade-mark. He may obtain damages for imitations or fraudulent use of the mark. He may even exclude the original goods from the market, so long as they bear the trade-mark.

He may apply the trade-mark to spurious goods and may have the American owner or his local representative jailed and fined as an "infringer."

Trade-Mark Pirates

Many Americans have not yet anticipated the time when they may wish to send their goods into markets not covered now, or at least prevent the sale there of spurious goods under their trade-marks.

In several countries any one may register a trade-mark without using it now. He may reserve it for future use.

In one day recently a Paraguayan merchant registered for his own purposes fourteen trade-marks which non-residents had failed to protect with registration.

That native merchant may be planning a situation similar to that which confronted an American mill in Holland which for a number of years had sold to an Amsterdam house under one trade-mark, and to a Rotterdam house under another trade-mark. Eventually the mill decided to extend its distribution thruout Holland and to register these trade-marks. To the amazement of the management it was then found that the two Dutch houses had registered the marks in their own name and now controlled the situation. They threatened the mill's business in Holland, un-

less it agreed to their continuing as its sole distributors there.

Trade-mark piracy is frequently committed by representatives and agents or by persons negotiating for employment, who learn the intentions of the manufacturer and either register the trade-marks for themselves or carry information to others who register them.

One motive often found behind such registrations is the desire for permanent employment. The control of trade-marks by agents and representatives insures them redress, should a manufacturer decide to terminate their contract and take up with some one else.

In Cuba the agent of a computing machine company, on being dismissed from its service, went into the employ of a competitor after first registering in his own name the trade-mark of his former principals. Imagine the feeling of his former employers when they learned that this agent was thereby enabled to block their sales! They decided to fight him to a finish, but were eventually forced to make new castings in order to eliminate the trade-mark from machines sold in that market.

One of our oldest piano houses had a similar experience and was compelled to buy back its own trade-mark because it had failed to register in advance of a local dealer.

It cost the maker of a patent medicine, who was caught in this way, $28,000 for the privilege of using his own trade-mark. A mineral water concern con-

siders that it got off easily by meeting a demand for $2,500. Not being willing to pay, a typewriter company had to create and exploit a new trade-mark, to compete with its own, which had become the property of a former agent.

Not an Unmixed Evil

"Compulsory registration" of trade-marks, as it exists in Latin America and abroad, is not, however, an unmixed evil, as many Americans are discovering.

For one thing it eliminates the risk of attack from obscure competitors, who often have played havoc with advertising appropriations. Where trade-mark rights originate with registration and do not depend on prior use, there is not the constant fear that one's trade-mark may pass to a competitor, as it may in the United States, if a competitor proves that he used the mark first, even tho in a limited field and in a limited way.

Injuring American Trade Abroad

I am not unmindful, of course, that "compulsory registration," as it exists in Latin America and abroad, has been hurtful to American interests.

For years it has been a matter of complaint by the representatives of this government that trade-marks of standard goods made here have been imitated and placed on inferior articles made in foreign lands. Many of the complaints were against manufacturers in some of the chief European countries. By clever copies and imitations of our trade-marks on their own

inferior goods, these manufacturers discredited American wares, while replacing them with their own goods.

Of late the Japanese also appear to have taken to this sort of activity, especially in the Chinese markets where they are said to be substituting their own wares for American.

In one year, an American manufacturer's sales of underwear in China fell from 5,000 cases to less than 400, all because he neglected to register his trade-mark and safeguard it from persistent infringement.

Tho a Japanese label which imitated the label of Buchanan's "Black and White" whiskey used another signature than Buchanan's, the other signature was such that it deceived the public into thinking it was Buchanan's.

More recently the Japanese attacked "Kodak" by appropriating the name inseparably associated with it, so that "Eastman" has now become the registered property of a Japanese subject, covering his photographic material and supplies.

Registration in China

The Boxer uprising and the overthrow of the Empire was followed by the drafting of a law for the registration of trade-marks in China; but that law has never gone into effect, chiefly because the United States and Great Britain would not agree to the proposal of other powers that registration, rather than first use, be the foundation of rights.

Meanwhile, applications for registration have accumulated, and the Republic of China has allowed

claims of ownership to have publicity by filing them in the Bureaus of Customs at Shanghai and Tientsin. Also the Republic has given trade-mark owners the privilege of having the government post and cry proclamations warning natives against infringement on pain of public whipping and other disgrace. This, with the possibility of their being made to pay damages in addition, has proved a deterrent among the Chinese. This attitude of the government has not, however, affected the foreign trader, since foreigners can send into China from their own countries goods bearing infringing trade-marks. An injured manufacturer is helpless under present conditions as to trade carried on by foreigners, unless he has previously registered his trade-mark with the home governments of those foreigners.

This emphasizes the necessity of registering in the outside countries the trade-marks on all goods likely to reach China. When this precaution is neglected, there is a further question, as yet undecided, whether one can interfere with sales by the Chinese themselves, when goods with infringing trade-marks come from outside. One of our largest makers of toilet preparations is now trying to get relief from deadly inroads into his sales in the Chinese market, thru infringements originating in Japan, where registration was neglected.

The Practice of Other Countries

The difficulty outlined here is not confined to marketing in the Far East. One's trade-mark rights

may be jeopardized by failure to register in a Latin-American country where one's goods are being sold, perhaps without one's knowledge. Manufacturers ship to Chili and Peru, often believing that their shipments end there, whereas portions of those shipments usually find their way into Bolivia, which lacks ports of its own.

If a trade-mark is not registered in Bolivia, the goods bearing it are subject to confiscation, fines are imposed, and the trade-marks are open to registration by pirates.

The avowed purpose of such a government policy is to legalize and encourage the traffic in goods which are likely to meet with favor, it being recognized that, usually, legitimate trade-marked goods make a stronger appeal than untrade-marked goods. Among most foreign peoples the trade-mark, and especially the symbol, picture or design form of mark, is a vital factor in their buying, many being suspicious of untrade-marked goods.

The position of the Latin-American countries and others with similar laws, among them Norway, Sweden, Portugal, Germany and Servia, in enlightened Continental Europe, is in effect this:

Register your trade-marks and increase the value of your investment and your freedom (and monopoly) in merchandising under those marks. We will give you means of redress not otherwise obtainable, if your rights are infringed. And then those countries usually add a "do it now," as it were, by suggesting that they cannot be expected to know who is the

rightful owner of a mark, unless the fact is determined by one's registering his trade-mark before some one else does so.

In but few countries is it required that a trade-mark be used within a given time, failing which rights shall terminate or lapse. It is thought, therefore, that when governments offer so much in return to the manufacturer who avails himself of it, there can be no well founded complaint if some one else who knows less of the potentialities of the product, but who has more real conservatism, takes the mark and pays the government for protection of what it assumes to be his, as suggested by his compliance with the law.

In some countries one's rights are established immediately upon the local filing of an application; in other countries there is a delay of several months; and in still others one's rights begin to run only with the issuance of a certificate. In no case, however, is there anything to be gained by delay in applying for registration.

What May Be Registered as a Trade-Mark

You may register in the United States and in most countries, any name, letter, figure, design, illustration, portrait, signature, or catch phrase, singly or in

combination, provided it is not identical with, nor so similar to one already adopted and used in a competing line in the particular country, that it may deceive or confuse unsuspecting purchasers; and provided also that the trade-mark is not obviously descriptive of the nature, ingredients, character or grade of the article with which it is associated.

Articles are considered to be in a competing line when they are of the same nature, serve the same general purposes and might reasonably be expected to come from the same concern.

Also, the subject of registration must not be the mere name of an individual, corporation or association (except in those countries where commercial names, as distinguished from trade-marks, are separately registered) nor the name, portrait, or signature of a living person, unless he has either personally or thru his legal guardian given written consent to use it; nor, except where rights have long vested in it (see the law), should a trade-mark be the name, distinguishing mark, character, emblem, colors, flag, or banner of any institution, organization, club or society; nor be composed of the flag, coat-of-arms or other insignia of the United States, a state, municipality or foreign nation; nor consist of or resemble the insignia of the American National Red Cross, long entitled to use its insignia; nor be the insignia of the Masonic fraternity, the Loyal Legion or other patriotic or fraternal bodies. Also, the trade-mark must not be merely the designation of form, size, decoration, color, or method of construc-

tion of the package or other means of inclosing the article, or a mere description of the label used in such connection. Names of patented or copyrighted articles can not, at the expiration of the patent or copyright, be protected as trade-marks, nor can trade-mark protection be secured merely to perform the functions of a patent.

In refusing protection to a trade-mark based upon the two-color combination of the head and tip of a certain match, one of our highest courts said, "The primary colors, even adding black and white, are but few. If two of these colors can be appropriated for one brand of tipped matches, it will not take long to appropriate the rest. Thus, by appropriating the colors, the manufacture of tipped matches could be monopolized by a few vigilant concerns, without any patent whatever."

Further, the trade-mark must not be libelous, nor a violation of that veneration, love or respect which is generally known to be associated with certain individuals, officers, and stations in domestic, religious and public life; also, the trade-mark must not be obscene or otherwise immoral, associated with articles injurious to the public, used in unlawful trade, or be a misrepresentation of the person responsible for the goods or ingredients, or of their nature or quality, uses or efficacy, or of the place of manufacture.

Even tho a trade-mark may be unobjectionable in these particulars when registered, the advantages of registration will be forfeited if afterward its character changes or it is associated with advertising

which contains a misrepresentation. The makers of "Moxie Nerve Food" claimed that "Moxie" was a nerve food. The trade-mark "Moxie" was infringed but as it could not be proved to the court's satisfaction that Moxie was a nerve food, the court refused to protect "Moxie" from infringement. Since then the term "nerve food" has been dropped from the trade-mark and from the corporate name.

Special Consideration to Early Trade-Mark Users

Notwithstanding the limitations just specified, you can register in United States Patent Office any mark which you, or a person who may have sold his interest to you, may have monopolized as a trade-mark ten years before February 20, 1905, in foreign trade, in interstate commerce or in sales among Indian tribes.

Even with such protection, however, it must be plain that you could not overcome the inherent weakness of an obviously descriptive, or merely personal or geographical term. By its demand for something out of the ordinary—for someting individual—the law helps rather than hinders you. No trade-mark can be too individual, and the farther away you get from the obviously descriptive or merely personal or geographical mark, the more individual your trade-mark is likely to be.

Use In Advertising Not Enough

You should not confine the use of your trade-mark to advertising, because the law demands that it shall be used as a means of identifying and of fixing re-

sponsibility for goods, and as such must be written, printed, impressed, woven, affixed, or used with a portrait, in some distinctive manner on the article or on the means of inclosing the article. Also, the trade-mark must be actually used in sales and shipments to customers in different states, in foreign countries, or among Indian tribes; and it must be owned or controlled by an individual or concern domiciled in the United States or by an individual or concern of a foreign country which affords similar registration privileges to trade-mark owners of this country seeking protection there.

Registration in Various States

By registering your trade-mark in various states as well as in the Patent Office, you can secure certain additional advantages, chief among them being the right to jail an infringer.

In some of the states you may register advertising symbols, forms of advertisements, trades union and other labels, besides the forms of trade-marks that you may register in the Patent Office.

Function of a Trade-Mark

The function of a trade-mark is well, tho humorously, illustrated in an advertisement of a cement company sent out to dealers in building material. That advertisement reads:

Lucullus was the Bradley Martin of antiquity.

It was said that a square meal at Lucullus' country house cost one hundred thousand sestertiums.

It was a favorite trick of Lucullus' friends to stop him in the Forum, and beg to be taken home to dinner, hoping to

catch him some day when they had nothing but warmed-up potatoes and cold meat.

"Take me out to dinner, Cul," said Cicero one day. "No fuss, I just want to take pot-luck."

Lucullus telephoned out, right before Cicero, and simply said: "Serve dinner for two in the Apollo room."

The room was decorated with American Beauty roses, and the dinner cost about ten thousand sestertiums a plate.

The secret was in that word "Apollo."

Lucullus had an understanding with his servants that when he said "Apollo Room" it meant "Blow yourself on a meal."

The advertisement went on to point out that it is a great thing when one word stands for so much. It saves inquiries, explanations, misgivings; it fixes responsibility, and that in turn prods the producer to give full value. This attracts reorders, without which the average business can hardly hope to succeed.

Briefly, a trade-mark is at once an identification and an assurance of quality.

Ownership in a Trade-Mark

There can be no ownership in a trade-mark, except as it symbolizes good-will. When it does that, it is a property which can be sold, mortgaged or leased and may outlast buildings, machinery and men, often becoming the most valuable asset of a business.

When Trade-Marks Are Protected

Trade-marks are protected when they are used in fair competition, are made to fix responsibility, and meet the requirements as to their form, nature and character previously outlined.

While the Patent Office exercises much discretion in deciding what trade-marks shall be accepted and what refused, registration, tho desirable, is not the final judgment of fitness, for that must come from the courts.

If a trade-mark fails to help the public identify desirable goods, and thereby avoid undesirable goods, courts withhold their protection, even tho the trade-mark has been registered.

Personal Names

You may use your own name as a trade-mark, if such use does not interfere or threaten to interfere improperly with a competitor's previously established good-will.

If confusion is likely to result from such use, it is immaterial that the exact spelling and pronunciation of your name does not correspond in all particulars with the spelling or pronunciation of a competitor's name, as was pointed out where the name "RoDgers" was used in competition with "Rogers," and "Hooton" was used in competition with "Van Houten."

You may use the name of a person other than yourself, provided you do not invade his right of privacy, as where hose was named "Weston Sox" with the permission of the famous pedestrian.

Among the other personal names available, are the names of mythological characters, e. g. "Apollo" used for a player piano; names of characters in history and fiction, e.g. "Salome" for silks, and "Buster

Brown" for hosiery; and names of objects given personal characteristics, as "Big Ben," the big clock of the Houses of Parliament, a name now used for a large alarm clock.

The mere design or form which a name takes will not make it usable if it is otherwise objectionable, but often a personal name can be joined with a common word so as to give an individuality to a product, e.g. "Shaw-knit" hosiery and "Taylor-Made" candies.

Sometimes different parts of corporate names can be used effectively, as where "Necco" was made from the initial letters of "New," "England," and "Confectionery" and the first two letters of "Company," as a designation for "sweets."

By a slight change in the ending of a personal name, a distinctive trade-mark can be coined, as where "Suesine" for silk, started with the first name (Sue) of the wife of the sales manager of Bedford Mills.

A suggestive name may be created from a personal name, as "Printzess," used to designate the distinctiveness of the dresses made by the Printz-Biederman Company.

Initials are used to accomplish this same end, as for example "E.C." Ventilated Shoes designates the product of the Engel-Cone Shoe Company.

To the initials of a personal name, other letters may be added to form different words, as in the case

of "Bien Jolie," meaning "very pretty," designating the corset of Benjamin & Johnes.

Figures are sometimes combined with personal names to fix the individuality, as "1847" with "Rogers Bros.," the date there being the year the business was established.

A signature, portrait and mere initials, e.g. "W. B." for Weingarten Brothers, may be used as a trade-mark. The use of a signature would give you a two-fold protection—under the law of forgery, and under the law regarding trade-marks. The makers of Kellogg's Toasted Corn Flakes feature and look upon the signature as the best identification of the product.

Symbols may be used instead of, or in combination with, a personal name. For your symbol you can draw upon hieroglyphics, religious symbols, signs of the Zodiac, seals, ancient coins, architectural forms, animals, birds, flowers, mountains and other objects, either as illustrations or as conventional designs, singly or in combination.

A symbol may be illustrative, as the bell used by the American Telephone & Telegraph Company and Associated Companies in the Bell system, or suggestive, like the winged foot of Mercury used in combination with "Goodyear" for tires, or fanciful or

arbitrary, as the trade-mark of the double dragon used by Clarence Whitman & Company.

Geographical Names or Terms

Geographical names or terms may be used as trade-marks under the following circumstances:

First. Where, thru extensive association, a geographical name, as "Waltham," or a geographical term, as "Northern Pacific," or the nickname of an inhabitant of a locality, as "Hoosier," comes to suggest the commodity of a particular concern, as "Waltham Watch," "Northern Pacific" transportation and the "Hoosier Kitchen Cabinet."

Second. Where the owner of a trade-mark controls the location from which the trade-mark was derived, as in the case of "Buffalo Water," the product of the Buffalo Lithia Springs, Va.

Third. Where the geographical name is used in a fanciful sense, as "Vienna" applied to bread. In this instance it is commonly known that bread could hardly be imported from Vienna in the fresh condition that it reaches your table.

Sometimes a geographical name can be converted into a new word, as "Riveris" for a certain talcum which is combined with the essence of Riviera violets; or a geographical name may be reduced to a contraction, as "Ypsilanti" to "Ypsi" for a certain make of Indian shoes.

Again, a geographical name may be combined with

a personal name to make a mark like "Ingersoll-Trenton" for watches; or a geographical name may, thru combination with a common word, be used in a fanciful sense, as "Niagara Maid." This mark, you will recall, as appearing in succeeding issues of publications without material variation in the pose of the woman model or in the view of Niagara Falls. Such illustrations, therefore, give trade-mark value to the mark.

A geographical name, combined with a common name, can be used in a fanciful sense, as "Kalamazoo Komfort," the trade-mark of a reclining chair; while initials can be made to stand for geographical names in the same way that they do for personal names, as where "M" becomes the distinctive feature in "M" (or Minneapolis) waists.

Symbols for geographical trade-marks may be arbitrary, as in the case of railroad trade-marks like the oval of the New York Central Lines, or suggestive like the pinwheel symbol of the Pacific Mills, originated for "Serpentine" crêpe; or better still, like the illustration of the witch riding the stocking, in the symbol for "Ipswich" hosiery.

Common Names

You can use a common name or a common term for a trade-mark when it is not obviously descriptive of the nature, ingredients, character or grade of the article with which it is associated, or not faulty in other particulars specified earlier in this lecture.

Perhaps the rule that trade-marks must not be descriptive will seem more rational if it is recalled that there can be no such thing as an exclusive right to carry on any particular line of industry, unless that industry is controlled by a patent, or by a secret process. Manifestly, no one should have a right to cut off from others the right to enter an industry, by monopolizing a mere word or term, as "cut glass," "enameled ware" or "silver plate."

As was said in a case where trade-mark protection was sought in the picture of a drum used on boxes containing "Drum Collars," should protection be allowed to such descriptive trade-marks, different lines of merchandise would, one after another, be rapidly monopolized by broadly descriptive marks, and eventually some one, bolder than the others, might go to the very root of things and secure a trade-mark in brown paper and tow strings.

If a trade-mark is obviously descriptive, it can not be protected merely because of misspelling, as "Sopade," hyphening, as "P-I-T-T-S-B-U-R-G P-U-M-P," or peculiar lettering.

Peculiar lettering, to enable a trade-mark to be protected, should be distinctive, individual, and so far dominate the word as to be itself the trade-mark.

It would, therefore, be better to use a good design free from the shortcomings of a descriptive name.

Sometimes misspelling is used in a fanciful sense to make an effective trade-mark, as "Win-Sum" for a union suit which unites without seams the weights for winter and summer. Such a mark would be protected.

Also you can secure protection for a trade-mark which is descriptive, if by a distinctive ending or modification of a term in common use you create a term original to you, as "Chiclets," derived from "chicle," the name of the chief ingredient of all chewing gums.

Common words used in a fictitious or fanciful manner avoid the objection to descriptive words. Trade-marks of this kind are "Rough on Rats," used for an exterminator, to suggest the nature of the product; "Flower Drops," used for a perfume, to suggest the ingredients of the product; "Velvet," used for a "smooth" smoking tobacco, to suggest the character of the product; and "Nature's Rival," used for a bust form and corset waist combined, to suggest grade.

In return for this freedom in choosing a trade-mark for your product, you must comply with the pure food acts and similar laws.

Imposition on the public will result in a forfeiture of trade-mark protection.

Symbols can be made to take the place of, or illustrate, common words, as in the case of the trade-mark of "Black Cat" hosiery, "The Lily of France"

corsets, and the conventionalized umbrella of the Abbot-Detroit Motor car.

Titles and Names Protected

If you use the form, size, design or color of a package or label, in such a distinctive manner that it performs the functions of a trade-mark, it will also be protected in a similar way under what is known as the law of unfair competition.

Essentials of a Trade-Mark

It is essential that a trade-mark convey the meaning intended; that this meaning shall be understood by your buying classes in all the localities where the product is sold; that the appearance and suggestiveness of the trade-mark be agreeable; and that, thru careful use, the trade-mark can be made to distinguish the product from the products of all competitors. If it is in the form of a design or in distinctive lettering, the trade-mark should be so simple and so free from unnecessary detail, that it would be legible whether in the size of a silver dollar or of a lead pencil head.

It is not essential that the trade-mark contain the name of your concern; in fact, ordinarily it is better without it.

In applying these tests, one must give the broadest meaning or scope to each requirement, for the purpose of a trade-mark is not only to attract business by causing the goods to be remembered and identified, but also to protect against unfair competition. The

advertiser may be called upon to defend his trade-mark title even while he is asserting it. Unguided, he may have chosen a word which infringes the rights of some obscure manufacturer who will seize the opportunity to "bleed" a prosperous competitor.

What to Choose

Whether a trade-mark should be a name, a symbol, or one of the other forms considered depends upon the conditions that govern your business and your markets. Symbols, illustrations and other pictorial forms are often more attractive than names or words, but names or words can be fixed more readily, and often more definitely, in the memory of the public.

In order more easily and speedily to establish good-will, you should, if possible, employ one trade-mark, rather than several; for, as was pointed out by a stove manufacturer, the concern which tries to popularize ten different varieties of the same product under ten different trade-marks will be ten times as long in gaining a foothold in the market as the concern which uses one mark to cover ten varieties of the same product. There is, however, no legal objection to your having a different trade-mark for each class or variety of your goods.

Adoption and Use

In this country no rights can be based upon or grow out of a trade-mark until it is adopted and used. Here adoption can be made known to the public by registration or by any statement or act which shows

intention to use the trade-mark in order to distinguish your product from all other products in the same line of business. How soon after its adoption a trade-mark must be used, and how long that use must continue to give you vested rights, depends somewhat upon circumstances. However, in all cases it must be clear that, both at the moment of adoption and at that of use, there has not been either an abandonment or an intention to abandon, and that the use of the trade-mark has not been merely casual and interrupted.

The fact that after you have adopted and used a certain trade-mark, you add another feature to it, does not impair your rights, provided the added feature does not confuse the public as to the identity of your goods. Thus, where after the word "queen" had become identified with shoes of a certain make, the word "quality" was added to it to form the trade-mark "Queen Quality," protection to the altered mark was not sacrificed.

Improvement of Trade-Marks

It may already have occurred to you that many of the trade-marks now being used are not secure foundations for the fortunes that are being spent in popularizing them. It would be well if more concerns would follow the example of the American Tobacco Company, or better still of the American Crayon Company and the National Lead Company which took on new trade-marks, first to supplement and then gradually to replace the old without sacrificing good-will.

While in the midst of one of its energetic advertising campaigns the American Tobacco Company was attacked by a competitor, who not only claimed prior use of "Ramleh," for cigarettes, but also pointed out that "Ramleh" was not open to appropriation by the "Trust," because it was the name of a city in Egypt, a mere geographical mark. In this dilemma the American Tobacco Company ingeniously reversed the letters of "Ramleh" and obtained the trade-mark "Helmar."

Until a few years ago the National Lead Company had been using twenty-three brand names, a few, sometimes only one, having become identified with the business of a given territory, and none of them having been used nationally. That was when the company confined its publicity to the newspapers. To broaden its sales thru the magazines by including all its products under one general head, it adopted for supplementary use the now famous "Dutch Boy Painter." This trade-mark is now gradually superseding the old brands in popularity and value, tho these are still retained in a subordinate way to hold such good-will as may be associated with them.

I do not favor radical changes in trade-marks, however faulty they may be, except in certain cases, and then only after careful consideration. In some cases changes are suggested and warranted by the success and the trade-mark character of some feature in the advertising "copy." Such a feature has become the trade-mark of the South Bend Watch. You will recall it as a watch within a cake of ice.

Sometimes a change is also suggested by the success of a sales feature, like the Buzz Saw window demonstration of Regal shoes.

Analysis of Trade-Mark

Before adoption it is well to subject a trade-mark to close analysis as to its business or constructive, as well as to its legal or protective value. In passing on the word and symbol "Peacock" for a many-colored dress silk of fine quality, I analyzed it in this way:

1. "Peacock" suggests "fine feathers," good clothes, if you please; in other words, is appropriate.
2. It stimulates admiration. The vanity and attractiveness of the peacock are proverbial.
3. It suggests various colors.
4. It creates a mental picture which lives in one's thoughts.
5. It recalls pleasant associations, as in rambles over an estate, where the peacock was one of the things of beauty.
6. It suggests superiority and exclusiveness. In the early days of chivalry one of the highest rites was accompanied by "the oath on the peacock"; and it will not be forgotten that at the most sumptuous banquets the peacock was the principal decoration of the table.
7. It is not obviously descriptive.
8. It is distinctive.
9. It is readily understood.
10. It is universally understood.

11. It is easily designated, referred to, or pronounced.

12. It conforms to every canon of good taste.

13. It is in the favor of all nationalities. With some persons, however, there is a superstition that the peacock is an omen of bad luck. This grew out of the classical myth about Argus, who was metamorphosed into a peacock with a hundred eyes in his tail as punishment for his treachery. Of course this myth is comparatively little known, but if you believe the superstition at all widespread among probable buyers of your silks, it may be well to think twice before deciding on this word, altho my own judgment is that its advantages greatly overbalance such considerations.

14. The symbol "Peacock" is simple.

15. It can be reproduced large or small.

16. It can be reproduced in colors or in black and white.

17. It is strong in line or in halftone.

18. It is attractive alike in advertisements and on labels.

19. It lends itself to window display and secondary use.

20. It conforms to various legal requirements.

21. There yet remains the question: "Has the trade-mark been adopted and used by any one else?" To determine this point it would be necessary to search the records of marks registered not only in the Patent Office, but among the individual states, which protect marks in much the same way as does the

Patent Office, sometimes giving even broader protection. Besides this, it would be necessary to make a search of the records, so far as they exist, of those thousands (perhaps well into the millions) of unregistered marks which are just as binding and just as much to be taken into account as those which are registered.

Steps Necessary to Register

In seeking registration of a trade-mark in the Patent Office, it is necessary to file there a petition, a statement, a declaration, a drawing and specimens or facsimiles of the trade-mark.

You could prosecute your own case, but manifestly your unfamiliarity with the papers and course of procedure would make it advisable for you to employ an attorney. Says a business man: "Manufacturers who fail to employ competent counsel when they choose their trade-marks deserve all the trouble that visits them later. Years ago trade-marks counted for little; but today some of them are worth millions. It is impossible to exercise too much care in choosing them. It is better to spend a few hundred dollars and get the thing right at the start than to be forced to spend thousands for legal services later on."

Trade-Mark a Monopoly

A trade-mark can be made a concern's one perpetual monopoly. Patents and copyrights are protected but for a limited time. Secret processes are open to discovery and, in that event, are subject to

use by others. Franchises of various kinds all too soon expire, even when the operations and the very corporate existence of a concern depend on them. On the other hand, a trade-mark can be made to go on forever, monopolizing the demand which grows out of the good-will it attracts and develops.

In a recent decision upholding the right of a certain cereal company to refuse to sell to jobbers or retailers who cut the price it was said: "The company's business consists in lawfully monopolizing a trade-name and impressing the public with the purity, reliability, and uniformity of the very common substance it sells under that very cleverly chosen name." And then the court adds this estimate of value which should never escape the trade-mark owner or prospective owner: "The selection of the name was quite as important as the selection of the middlings, when the business began, and after so much advertising the name is by long odds the most important element in the business."

The Need of Protection

Yet, the trade-mark is usually the least protected and exploited of any species of property.

If a concern is about to build a factory, an abstract is made of the title to the real estate, and this is carefully examined by specialists, and their judgment fortified by a guaranty policy. When the building operations begin, fire-proof material is secured, and in order still further to safeguard the factory from destruction, a sprinkler system is installed. Plate glass

windows add a further protection and then this form of protection is insured. Safety appliances are installed and yet casualty insurance is also taken out. Locks and bolts guard against thefts, yet burglary insurance is added. Men of unquestioned reputation are put in charge of accounts, and yet fidelity insurance and insurance against bad debts are recognized as essential. All thru the enterprise precautions are taken except in one particular, and that relates to the most valuable property of all, the trade-mark and the good-will it symbolizes.

This carelessness is not confined to the selection or the creation of a trade-mark, but extends thru every phase of trade-mark use; but the carelessness shown in the selection or creation of the mark has such a bearing on the subsequent use and exploitation of the mark, that this phase forces itself upon one's consideration, perhaps with undue prominence, for less known phases are of even greater importance.

Always you should look upon each competitor as a possible infringer or substitutor. It is the experience of those most familiar with unfair competition that a competitor may have conducted his business for years with no thought of poaching upon the trade-mark rights of others. The output of his factory may have been absorbed each season, and indeed there may at times have been more orders than could be filled. But conditions sometimes change quickly with the advent of aggressive new competition. Your own concern may prove singularly successful in winning customers, so much so as to create envy.

From among your trade-marks or labels the competitor may select one for imitation. This may take with the public and readily be confused with your own. Presently another trade-mark or label may be approrpriated, and perhaps another, and still another. Encouraged by the way the public buys his goods thru the help of the imitating trade-mark or label, the competitor will grow bolder and bolder. Price reductions and misleading advertising, with other unfair competition, will doubtless follow.

Here is where it is essential that one have a system for coping with unfair competition, based upon evidence of such nature and preserved in such form as to give effect to every marketing plan which conforms to legal requirements.

Who May Register a Trade-Mark

In Indiana, trade-mark registration is limited to citizens of that state, but in other states registration is allowed regardless of citizenship or residence. In the Patent Office, trade-marks may be registered by any person (including individuals, firms, corporations, or associations) domiciled in this country who is the owner of a trade-mark used in commerce with foreign nations or among the several states or with Indian tribes; and by the owner of a trade-mark who is a resident of any foreign country which has granted similar trade-mark protection to our people. The owner of a trade-mark residing or located in such a foreign country, but having a factory here, may avail himself of the protection of our laws by registration

in the same manner as an American citizen. Such foreigners are required to include with each application a certified copy of registration from the home country, applicable to the same mark, and covering the same merchandise set forth in the application here. Also, they must apply for registration here within four months of their first application in the home country for the same scope of registration.

The insular possessions (Hawaii, the Philippines, Porto Rico, Guam) and the Panama Canal Zone, as well as Alaska and the several states, are included in our territory.

Except where authority is especially granted by state law, a voluntary association of laborers or manufacturers, having no proprietary interest as an association in certain goods, may not register a trade-mark for such goods in the Patent Office.

To comply with the requirements that a trade-mark shall be used in commerce with foreign nations or among the several states or with Indian tribes, before registration will be granted in the Patent Office, it is not necessary that the traffic be heavy. A concern in New York City, for instance, could meet the requirements by sending a small consignment of goods across the Hudson River to a concern in Jersey City.

Cost of Registration

The official fee for registering a trade-mark in the Patent Office is $10. In addition to this there is a necessary outlay for a drawing in the technical form

and manner prescribed by law, and attorney's fees. Inasmuch as the official fees must be paid in advance, it is customary for attorneys to make a lump charge of from $25 to $50, and make this cover their own and the official fee, besides the outlay for a drawing.

The cost of registration in each state is somewhat less, usually $20 to $35 in all.

Registration in foreign countries, including the official fees, can ordinarily be had for from $35 to $125, depending upon the country.

When a trade-mark has been registered, an official certificate is usually issued.

Some Additional Points to Remember

Registration in the Patent Office is binding for twenty years, but can be renewed indefinitely at the end of each period. The duration of registration in the different states and foreign countries varies.

In case of conflicting applications for registration, or in any dispute as to the right to use a trade-mark, which may arise between an applicant and a registrant, an "interference" or "opposition" will be allowed, so that the parties concerned may have an opportunity to establish their claims. Such work is, like other litigation, variable as to time and ability required, and there is no settled charge, except for the incidental official fees.

Always a registration in the Patent Office is open to question and cancelation. At any time, any one who deems himself injured by the registration of a mark in the Patent Office may apply for cancelation

of the mark, whereupon the matter will come up for a trial, after notice to the parties concerned. If, after such consideration, it shall appear that the registrant was not entitled to the use of the mark at the date of his application for registration, or that the mark is not used by the registrant, or that it has been abandoned, so that the contest is decided against the registrant, the mark will be canceled.

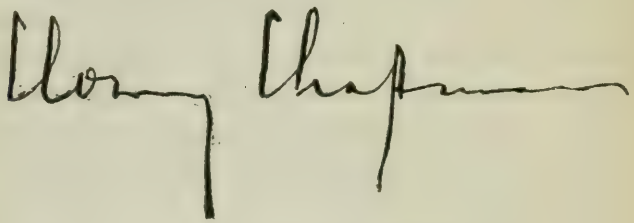
The protection of one's trade-mark rights depends upon constant use and vigilance in use. Week after week applications are made for the registration of trade-marks in the Patent Office, and some of these may relate to marks which ought not be registered. Prudence suggests that you make provision to have the records watched constantly by counsel qualified to advise you and to conserve your interests.

Upon application to the Treasury Department, the officials of the Customs House will lend every assistance possible in blocking the importation of goods infringing your own.

Upon all products covered by a trade-mark registered in the Patent Office, or, when this is impractical, upon the bottle, box, package or other means of inclosing the product, there must in some manner be impressed or affixed the words "Registered in U. S. Patent Office", or "Reg. U. S. Pat. Off."; otherwise in a suit for infringement, no damages may be recovered except on proof that the defendant was duly notified of infringement and continued it after notice.

The consideration of prize contests for securing and exploiting trade-marks, the designing of labels and

packages, the transfer of title under a sale or after death, the rights in trade-marks upon the dissolution or bankruptcy of a concern, or the sale of its property to satisfy the judgment in a collection suit, together with many other details in the development and protection of profits and good-will that go beyond the scope of this lecture, will be found in the writer's two books on "The Law of Advertising and Sales."



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